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In The

Supreme Court of the United States

October Term, 1996

LOUIS SILVERMAN; DIANE SILVERMAN; URBAN SEARCH MANAGEMENT; and DEVELOPMENT MANAGEMENT GROUP, INC.,

Petitioners,

v.

THOMAS WALKER; ANTHONY TYUS; HOPE FAIR HOUSING, INC.; LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES; INTERFAITH HOUSING CENTER; and SOUTH SUBURBAN HOUSING CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Opinion of the Court of Appeals for the Seventh Circuit is consistent with the opinions of this Court, and of other circuit and district courts in both fair housing and civil rights cases. Consequently, further review is not warranted. The issues before the Court are:

I. Does mitigation require an injured party to confront the wrongdoer or take affirmative steps to avoid the wrongdoer's illegal conduct?

II. Should the Court issue an advisory ruling on harmless error, given that the Seventh Circuit applied a strict standard in determining that a new trial was required?

III. With respect to the reversible error on the exclusion of experts, should the Court "hold" this case pending a ruling in *General Electric Co. v. Joiner*, No. 96-188, even though the Seventh Circuit correctly applied this Court's analysis established in *Daubert*?

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STATEMENT OF THE CASE

Petitioners' statement of the case omits or misstates a number of key facts. The evidence at trial established that Louis and Diane Silverman and their wholly-owned companies, Urban Search Management and Development Management Corporation (collectively, the "Silvermans"), engaged in an advertising campaign for The New York, a rental building located in Chicago, using thousands of ads depicting only white people and never an identifiable member of a minority group. R.239 at 30, 93, 98; R.270-1 at 356.[1]

Nearly half of The New York's newspaper ads and all of its billboards failed to include the Equal Housing Opportunity ("EHO") logotype, statement or slogan required by the Department of Housing and Urban Development ("HUD") regulations.[2] R.237 at 551. The ad

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[1] Contrary to the Petition (hereinafter "Pet.") at 4, the evidence did not establish that an advertisement depicted one African-American man entering Wrigley Field. Although the Silvermans' witnesses claimed for the first time at trial that a man in a crowd appeared to have a dark arm, his face was hidden. The evidence was uncontroverted that neither the Wrigley Field ad nor any of the Silvermans' other ads depicted the face of any identifiable minority. Even after this suit was filed, The New York's one integrated ad was published only in a publication in which The New York did not normally advertise. Petitioner's Appendix ("App.") 3.

[2] Section 3604(c) of the Fair Housing Act prohibits real estate advertising from expressing a preference based on race or color. 42 U.S.C. § 3604(c). The HUD regulations provide that all residential real estate ads should use the equal housing opportunity ("EHO") logotype, statement or slogan, 24 C.F.R. § 109.30(a), and they provide that an advertising campaign that depicts people "should be clearly definable as reasonably

campaign included radio advertisements targeted to white listening audiences, R.237 at 758-65,[3] and the radio ads also failed to include the required EHO statement.

The Silvermans' failure to follow the Fair Housing Act ("FHA") was especially egregious since they had received a $4 million Urban Action Development Grant to build The New York, and they enjoyed the benefit of $62.6 million in tax-exempt municipal bonds issued by the City of Chicago to further assist in construction, both of which obligated them to abide by non-discriminatory practices. App. 3.

The jury found that Louis Silverman caused racially discriminatory advertisements to be published, but awarded no damages. (Inexplicably, although the Silvermans had stipulated that all four defendants were responsible for all the ads, R.237 at 661-62, the jury found only Mr. Silverman liable.) The verdict established that the campaign was discriminatory. App. 4.[4]

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representing the majority and minority groups in the metropolitan area." 24 C.F.R. § 109.30(b). Furthermore, advertising campaigns that "cater to one racial or national origin segment" may violate the Act. 24 C.F.R. § 109.25(c).

[3] Petitioners understate the evidence when they claim that "five or six radio advertisements" failed to include the required EHO statement. Although there were six *different* radio advertisements that aired for The New York, R.239 at 164, each advertisement was aired hundreds of times. None of these hundreds of airings contained the required EHO language. R.270-1 at 438.

[4] Petitioners do not challenge the jury's finding that the ads were discriminatory: "The court also did not conclude that the evidence was insufficient to support the verdict." (Pet. at 6).

On December 6, 1996, Chief Judge Posner and Circuit Judges Frank Easterbrook and Diane Wood issued a unanimous opinion reversing the case and remanding for a new trial. Petitioners do not challenge the Seventh Circuit's findings of error in the instructions on actual injury, the statute of limitations and punitive damages; they focus solely on the court's rulings on the mitigation of damages instruction and the exclusion of plaintiffs' experts. In addition to these errors, the Seventh Circuit found that the misconduct of the Silvermans' trial counsel and the bias of the trial judge unfairly infected the trial, but in light of all the other reversible errors, declined to determine whether these errors alone would require a new trial. App. 5. In short, the Seventh Circuit's opinion did not limit the assignment of error to the exclusion of plaintiffs' experts and the four erroneous jury instructions, but found that these errors were "just the most egregious in a trial that suffered from many problems." App. 8.

REASONS FOR DENYING THE WRIT

I. THIS CASE RAISES NO SIGNIFICANT ISSUE CONCERNING MITIGATION UNDER THE FAIR HOUSING ACT

The Silvermans argue that the Seventh Circuit broke with tradition in rejecting the instruction to the jury that plaintiffs could not recover for "any item of damage" that they could have avoided "through reasonable effort." And yet, as the Silvermans concede, the only evidence they offered for the alleged failure to mitigate was that plaintiffs (1) continued to examine local newspapers for The New York's ads after they suspected a discriminatory

pattern, and (2) chose not to give the Silvermans pre-filing notice of the lawsuit. Pet. at 7. This issue does not merit this Court's review because (1) the evidence Petitioners offered at trial would not show lack of mitigation in any context, (2) the Seventh Circuit's opinion is completely consistent with the case law on mitigation, and (3) the harmful interplay between the mitigation instruction and other erroneous rulings by the trial judge requires a new trial in any event.

A. The Mitigation Instruction Was Misleading Because, at Trial, Petitioners Did Not Offer Any Evidence of a Failure to Mitigate

While Petitioners repeatedly refer to the "traditional" duty to mitigate, *see, e.g.*, Pet. at 7, 8, they have been unable to offer a single authority suggesting that mitigation includes the proof they offered at trial: Plaintiffs' failure to (1) avert their eyes to avoid exposure to the discriminatory ads, or (2) confront the wrongdoers and ask them to cease their wrongful conduct before filing suit. The mitigation rules that Petitioners suggest are anything but "traditional"; indeed, they are unprecedented. Neither averting one's eyes nor giving "one free bite" is a form of mitigation. The difference here is that Petitioners argued – and the trial judge instructed the jury – that plaintiffs had affirmative obligations to *avoid* or *prevent* the defendants' misconduct, not *minimize plaintiffs' damages*. The concept of mitigation addresses only the latter, as even Petitioners' authorities teach. For example, Petitioners cite 1 Dobbs, *Law of Remedies*, ¶¶ 3-9 (1993), but Professor Dobbs stresses that the mitigation rules

> do not apply to every kind of damages measurement. In general, available consequences rules apply to require the plaintiff to minimize special or consequential damages, *but do not usually affect measurement of general or market damages.*

Id. at 380 (emphasis added).

Thus, while plaintiffs may have an obligation to *minimize* their damages, *see id.* at n.5, they need not conduct their affairs so as to avoid coming into contact with the defendant's illegal activity. The latter are direct or *general* damages, not *consequential* damages, which plaintiffs might have the ability to minimize. Another authority on which Petitioners rely, 4 Sand, *et al., Modern Federal Jury Instructions – Civil*, ¶ 77.01 (1996), also underscores the fact that mitigation applies only to *minimize damages;* it does not impose an obligation on the victim to avoid potential violations, or to prevail upon wrongdoers to mend their ways. *See also* Charles McCormick, *Damages*, § 37 at 137 (1935) (plaintiff need only "minimize"; "damaging consequences of *past* wrongful conduct"). Accordingly, the mitigation instruction had no place here.

Petitioners' contention that the Seventh Circuit's opinion "held that in a fair housing litigation, it is error as a matter of law to instruct the jury on mitigation of damages," *see* Pet. at 7, is flatly incorrect. The Seventh Circuit simply held that *"in the context of this case,"* the jury instructions misstated the law. App. 12 (emphasis added). Because mitigation does not require plaintiffs to pretend that discriminatory ads do not exist, nor to confront the offender, App. 12-13, and because at trial Petitioners offered no evidence of plaintiffs' failure to

minimize *consequential* damages, the trial judge's lengthy mitigation instruction was confusing and wrong.

B. The Seventh Circuit's Opinion is Consistent with the Rulings of Other Courts on Mitigation

1. Fair Housing Cases Require Mitigation Only for Tangible Damages

Petitioners attempt to portray the Seventh Circuit's opinion as out of the mainstream of fair housing cases that have discussed mitigation. But the Seventh Circuit discussed the very fair housing cases on which Petitioners rely, *Young v. Parkland Village, Inc.*, 460 F. Supp. 67 (D. Md. 1978), and *Miller v. Apts. & Homes of New Jersey, Inc.*, 646 F.2d 101 (3d Cir. 1981), and agreed that mitigation instructions "*may* be appropriate for [fair housing] cases in which [the victim of discrimination] is denied housing." App. 12 (emphasis added). There is no question that there may be a need to mitigate the consequences of a *tangible harm*, like finding oneself homeless, as in *Young* and *Miller*. But this is a far cry from compelling victims of discrimination to confront the wrongdoers and give them another chance, or to cease investigating suspected discrimination in case they uncover more.

Unlike the tangible harms in *Young* and *Miller*, the injury at issue here was the diversion of the organizational Plaintiffs' efforts from counselling to litigation, *see, e.g., United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993), and the intangible injury that African-American home seekers experienced when confronted with The New York's discriminatory advertising campaign. App. 13. The Seventh Circuit concluded

that these types of organizational and intangible injuries do not typically lend themselves to mitigation, as is clear in the context of this case. Even Petitioners concede, Pet. at 9, that the only fair housing cases where mitigation has been applied involved the need to find substitute housing, *see Young* and *Miller*. Thus, there is no conflict.

In fact, *no* FHA authority suggests mitigation principles apply to intangible or organizational injury, or that mitigation requires the wronged parties to confront the wrongdoer or bury their heads in the sand. Indeed, Petitioners' mitigation instruction would require the plaintiff in *Miller* to warn the landlord that it was violating the FHA; even worse, if Mrs. Miller had any reason to suspect that the landlord might discriminate against her African-American husband, under Petitioners' version of mitigation, she would have had to refrain from applying for that apartment. Plainly, this is *not* the law. There is no split in authorities on the issue of whether plaintiffs in a fair housing case must avert their eyes or give pre-suit notice; these have *never* been held to be forms of "mitigation."

There are important reasons why fair housing plaintiffs cannot be required to stop examining discriminatory housing ads once they suspect discrimination. As the Seventh Circuit explained, because of the unique nature of discriminatory advertising, damage occurs gradually, as the all-white ads are repeatedly displayed.[5] A single

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[5] Here, The New York first ran a series of ads that told a story about a white couple, who were supposedly dating. To sue on just those ads would have been premature. The next phase of the campaign added The New York's real-life white concierge

all-white ad standing alone does not create the requisite pattern of discrimination that the FHA proscribes. App. 12. As *Balistrieri* explained: "The fact that the victim does not suffer the full effects of discrimination until he discovers the big picture does not change the fact that the defendant's discrimination was the primary cause of his harm," 981 F.2d at 933. Therefore, plaintiffs' repeated examination of The New York's ads was not "masochistic behavior," or a tactic "designed to run up the damages tab," it was the only way to tell if the campaign as a whole violated the FHA. App. 13. Any other rule would require plaintiffs to run into court upon seeing the first all-white ad, *see Ragin v. New York Times Co.*, 923 F.2d 995, 1002 (2d Cir.), *cert. denied*, 502 U.S. 821 (1991), – a result the Fair Housing Act does not encourage.

The Seventh Circuit's ruling is also consistent with precedent of this Court, and there is no need to revisit it here. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), held that even testers – who, by definition, seek out the harm of an FHA violation, purposefully subjecting themselves to discrimination – can experience a "distinct and palpable injury." *Id.* at 373-74. Testing efforts are always "voluntary" or "self-inflicted," and yet they have been recognized as a vital method of supplementing government resources to enforce the FHA. Under Petitioners'

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and a white woman on an exercise machine – still perhaps not a "pattern of discrimination." It was only in 1991, when The New York printed a series of ads that depicted ten or more individuals, all of whom were identifiably white, without including a single identifiable minority, that the discriminatory pattern was unmistakable.

argument, however, testers would have to notify the suspected violator before their investigation began and would be barred from any recovery for their investigation. Petitioners' rule would tell both testers and actual home seekers who suspected discrimination to avert their eyes. There is no precedent for Petitioners' argument anywhere in the FHA case law.

2. No Civil Rights Case Has Ever Interpreted Mitigation to Require Giving Pre-Suit Notice or Avoiding a Defendant's Illegal Conduct

Even Petitioners' authorities outside the FHA do not suggest a different outcome. For example, *Murphy v. City of Flagler Beach*, 846 F.2d 1306 (11th Cir. 1988), held that a discharged police officer's loss-of-income damages must be reduced by the amount of his interim earnings – another example of minimization of *consequential* damages, not the avoidance of direct or general damages. In *Smith v. Rowe*, 761 F.2d 360 (7th Cir. 1985), the Seventh Circuit suggested that a prisoner complaining about segregated confinement might have to take reasonable steps to lessen her segregation, for instance, by accepting a job that would take her out of confinement, even though she would have preferred a different job. In *Tatum v. Morton*, 562 F.2d 1279, 1283 (D.C. Cir. 1977), the court held that the plaintiffs' refusal to post a ten-dollar bail might bear on the measure of damages suffered for continuing detention. And *O'Neal v. Gresham*, 519 F.2d 803 (4th Cir. 1975), held that an employee who claims wrongful discharge must make reasonable efforts to find a new job. Each of these authorities addresses minimization of consequential

damages, not avoidance of defendants' unlawful conduct, as Petitioners' mitigation theory would require.

None of Petitioners' cases even remotely suggests that a plaintiff has an independent obligation to give a defendant pre-suit notice of its wrongdoing.[6] Developers are expected to comply with the fair housing laws, and they are not entitled to "one free bite" until some private party brings their violation to their attention. As Judge Easterbrook noted at oral argument, while the lament that "you should have stopped me sooner" may be popular with criminal defendants, in neither the criminal nor civil context is this a valid defense to illegal conduct.

Petitioners' own brief concedes that mitigation never places an independent obligation on the plaintiffs, but simply ensures that the damages suffered were "attributable to the defendants' conduct." Pet. at 8. Yet in arguing for mitigation here, Petitioners try to do just that – force plaintiffs to assume independent duties to change their own conduct to avoid being exposed to a wrongdoer's deeds, or to advise defendants of their legal obligations and try to persuade them to follow the law. There is no authority for such a proposition, and this case would be a uniquely poor place to invent one.[7]

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[6] Not only would it invite speculation, allowing the party who failed to follow the law to argue that it would have done so if only it had been personally advised, but such a rule would impose an inappropriate burden on plaintiffs – one that Congress did not see fit to impose.

[7] Requiring pre-suit notice would be ironic here, since Defendant Louis Silverman boasted that he had lobbied members of Congress from Mikva to Rostenkowski in an

C. The Inappropriate Mitigation Instruction Interplayed with Other Errors by the Trial Judge

The lengthy and inappropriate mitigation instruction was bad enough by itself, but as the Seventh Circuit recognized, it also had an unfortunate interaction with the erroneous instruction on limitations. On the front end, the jury was told that it could not award any damages for discrimination that occurred before April 1990 because, the judge erroneously ruled, that period was outside the limitations period.[8] Yet, on the back end, Petitioners' counsel was allowed repeatedly to argue (and the jury was instructed) that plaintiffs had looked at the ads too long; any damage they may have suffered after the first few all-white ads was "self-inflicted" and could not support liability. *See* App. 15. This interplay of the erroneous limitations instruction with the erroneous avert-your-eyes instruction inevitably led the jury to conclude that there was *no time period* during which Plaintiffs suffered compensable damages.

The mitigation instruction was also exacerbated by the erroneous and confusing actual injury instructions.[9] The jury was not only instructed to consider "mitigation"

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attempt to secure the passage of the Fair Housing Act. R.270-1 at 416-18.

[8] Petitioners have not challenged the Seventh Circuit's conclusion that the limitations instructions were erroneous as a matter of law.

[9] Again, Petitioners do not contest the Seventh Circuit's conclusion that these instructions were erroneous as a matter of law.

as it related to the measure of damages; Petitioners' counsel was also allowed to argue that plaintiffs' injuries were "self-inflicted" and could not give rise to liability in the first place.[10] *See* App. 12, 15. This argument, coupled with the trial judge's instruction, injected error not only on the question of the *measure* of damages, but also on the question of whether "actual injury" had occurred at all.

II. THIS IS AN INAPPROPRIATE CASE IN WHICH TO REVIEW THE HARMLESS ERROR STANDARD

Petitioners ask this Court to evaluate the "harmless error" standard for the review of error in a trial court almost as an academic exercise, given that the Seventh Circuit applied the strictest standard. Although they ask the Court to grant *certiorari* to resolve what they claim is a split in the circuits over the harmless error standard in civil cases, there are at least three reasons why this is not the case in which to resolve such a split even if there were one. First, Petitioners failed to address it below, and therefore the Seventh Circuit never discussed it. Second, the Seventh Circuit applied the strictest standard. And third, a new trial would be required here regardless of the harmless error standard that applied.

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[10] Petitioners correctly recognize, Pet. at 12, that mitigation should never affect liability but only the *amount* of damages. And yet the trial judge allowed Petitioners' counsel to argue that any item of damage that could have been avoided by averting one's eyes or giving pre-suit notice did not count. *See* App. 12.

Because the Petitioners did not raise the issue of the possible variation in harmless error standards before the Seventh Circuit, the Seventh Circuit never had the opportunity to address it. Without an opinion below, Petitioners effectively ask this Court for an advisory opinion – something that this Court has traditionally refused. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (refusing to issue an advance expression of legal judgment); *New York v. O'Neill*, 359 U.S. 1 (1959) (refusing to answer a question posed by litigant where the lower court had not ruled on that issue below). Because the Seventh Circuit did not even address the issue, this is not a proper case in which to review the harmless error standard.

The second reason that this is not the case in which to resolve issues concerning harmless error standards is that an analysis of the Seventh Circuit's opinion shows that, in fact, it applied the strictest standard. Therefore, whatever standard is applied, the result would be the same. Petitioners claim there are four harmless error standards applied by the circuits, ranging from the lowest standard: whether the error "may" have an effect on the outcome, to the strictest standard: whether it is "highly probable" that the error had an effect on the outcome. Petitioners are incorrect, however, when they characterize the Seventh Circuit's standard as the lowest standard. In fact, the Seventh Circuit articulated a *strict* standard: "a new trial is appropriate only if it appears that the jury *was* misled and its understanding of the issues *was* seriously compromised, to the prejudice of the losing party." App. 11 (emphasis added). Applying that standard, the Seventh Circuit determined that "[r]egrettably, that standard is satisfied for four separate issues: mitigation of damages,

'actual injury,' the statute of limitations, and punitive damages."

Finally, because there were so many errors in this case, a new trial would be needed here regardless of which harmless error standard is applied. As the Seventh Circuit held, this "case must be reversed and remanded for a new trial, in light of *several critical* errors in both evidentiary rulings and the instructions. App. 2 (emphasis added).[11] Thus, the accumulation of errors in this case unquestionably requires reversal. *See also Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 188 (7th Cir. 1993) (even if individual errors were harmless, accumulation of errors required reversal). In light of the host of serious errors, the Seventh Circuit's analysis satisfies even the most stringent standard. Therefore, even if this Court were to conclude that a new trial is appropriate only if it was "highly probable" that the error affected the outcome, *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924 (3d Cir. 1985), that standard is easily met here. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing writ of *certiorari* where question upon which writ was granted was hypothetical and would make no difference to the litigants).

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[11] Here, the Seventh Circuit found error with nine different issues: defense counsel's "inexcusabl[e]" conduct, racial bias in jury selection, the judge's bias and misconduct, the exclusion of plaintiffs' proposed expert Dr. Tarini, the exclusion of plaintiffs' proposed expert Dr. Massey, the jury instruction on mitigation, the "actual injury" instructions, the statute of limitations instruction and the directed verdict on punitive damages. Petitioners challenge only the assignment of error related to the exclusion of plaintiffs' expert and the mitigation instruction.

III. THIS COURT SHOULD NOT "HOLD" THIS CASE FOR A DETERMINATION OF *GENERAL ELECTRIC V. JOINER*

In a last-ditch effort to avoid a new trial, Petitioners suggest that this case be held until a decision in *General Electric v. Joiner*, No. 96-188 (11th Cir., March 18, 1997), is issued. Even if the Court were to announce in *Joiner* a new rule regarding appellate review of the exclusion of experts, it would not impact the Seventh Circuit's decision here. The Seventh Circuit found that the trial judge did not apply the required analysis under *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579 (1993). App. 8-9. In fact, the trial court performed virtually no analysis in excluding Dr. Tarini and Dr. Massey. Therefore, the Seventh Circuit had little from the trial court upon which it could give the "deference" Petitioners demand. Indeed, the limited rationale the trial court did articulate caused the Seventh Circuit to find reversible error: "[t]he court below erred insofar as it assumed that only evidence completely inaccessible to the jury could come in under Rule 702." App. 10. According to *Daubert*, Federal Rule of Evidence 702 assigns "to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert*, 509 U.S. at 597. Therefore, the trial judge not only erred in failing to perform the analysis required by *Daubert*, but it applied an improper test for the admissibility of expert evidence. In short, the Seventh Circuit reviewed the trial court's scant analysis, followed this Court's dictates in *Daubert*, reviewed Dr.

Tarini's qualifications and his offer of proof, and concluded that the trial court had committed reversible error.[12]

Furthermore, because of the numerous other errors that require a new trial, to "hold" this case pending this Court's decision in *General Electric* would only clutter the Court's docket.

IV. THE OPINION BELOW MAY BE AFFIRMED ON ALTERNATE GROUNDS NOT RAISED BY PETITIONERS

Even if this Court were to grant *certiorari* on the issues raised by Petitioners, this case would still require reversal due to the numerous other errors that contaminated the entire trial. Aside from the two grounds for reversal with which the Silvermans take issue, the Seventh Circuit also found reversible error in the "actual injury" instructions, the statute of limitations instruction and the directed verdict on punitive damages.[13] In addition, there were numerous other errors where the Seventh Circuit found no need to decide whether they called for

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[12] The fact that the Seventh Circuit remanded to the trial court's discretion the issue of whether Dr. Massey's testimony would satisfy *Daubert* indicates that it was affording the district court the proper deference.

[13] The Silvermans mistakenly contend that the erroneous jury instructions identified by the Seventh Circuit only address the measure of damages. Pet. at 15. The Seventh Circuit made clear that these instructions "went to the heart of the individual plaintiffs' claim to recover," App. 14, and, therefore, impacted the jury's ability to find injury as well as damages.

reversal in light of the errors that easily met that standard. As discussed below, each of these additional assignments of error was properly decided by the Seventh Circuit and makes a new trial necessary in any event.

The Seventh Circuit found that the "actual injury" instructions may have misled the jury into thinking that intangible injury, such as emotional distress, was not a proper basis for liability. This instruction conflicted with settled Seventh Circuit law, *Balistrieri*, 981 F.2d 916, as well as the law of other circuits, *e.g.*, *Johnson v. Hale*, 13 F.3d 1351 (9th Cir. 1994); *Ragin v. Harry Macklowe Real Estate Co., Inc.*, 6 F.3d 898, 907 (2d Cir. 1993); *Spann v. Colonial Village*, 899 F.2d 24, 29 (D.C. Cir.), *cert. denied*, 498 U.S. 980 (1990). This error explained the anomalous jury verdict: the ad campaign was discriminatory but there was no injury. App. 3-4.

As noted above, the trial judge instructed the jury to limit their consideration of The New York's ad campaign to a two-year time period prior to April 1992. R.240 at 1204-05. Section 3613(a)(1)(A) of the FHA is clear that the two-year limitation relates only to the time by which suit must be filed, not the time for which recovery is possible. Hence, the instruction was clearly wrong in light of plaintiffs' allegations that The New York's advertising campaign was part of a continuing violation. As discussed in Section I.C. above, the Seventh Circuit found that the interplay between this erroneous instruction and the erroneous mitigation instruction led the jury to believe that all of the damages plaintiffs suffered during the two-year period were self-inflicted. App. 15. The Seventh Circuit expressly found that not only the mitigation

instruction, but also the actual injury and statute of limitations instructions misled the jury and seriously compromised its understanding of the issues. App. 11.

The Seventh Circuit also found that the trial court erred in granting judgment as a matter of law on plaintiffs' claim for punitive damages, since the Silvermans admitted knowing about the FHA, and had expressly agreed to follow it as a condition of their government funding; yet they persisted in an ad campaign that violated the law. App. 15. The improperly directed judgment was an additional ground for a new trial. *Id.*

Although the Seventh Circuit did not reach the issue of whether the trial judge's bias and misconduct against plaintiffs and their case was so severe as to require a new trial, the impact of the trial judge's conduct was enormous. On appeal, plaintiffs raised numerous instances of improper judicial conduct. For example, in jury selection, the trial judge asked questions that were completely irrelevant to the case and which wrongly suggested to the jury that housing may legally be segregated by race. Even though "public" housing had no bearing on this case, the trial judge asked the following questions:

THE COURT: Does anybody on the panel reside in public housing? I am sure everybody knows what public housing is.

MR. JACKSON: Yes.

THE COURT: Would you stand up and tell us about it, please.

MR. JACKSON: Public housing?

THE COURT: I can't hear what you're saying.

MR. JACKSON: I didn't hear you.

THE COURT: Do you reside in public housing?

MR. JACKSON: Yes.

THE COURT: What is the name of it?

MR. JACKSON: Chicago Housing Development.

THE COURT: Chicago Housing & Development. Would the fact that you reside there – is that an Afro American housing or mixed?

MR. JACKSON: Mostly Afro-American.

THE COURT: Has there been any racial problems in that project?

MR. JACKSON: Yes.

THE COURT: Would that interfere in any way with you coming up with a fair and impartial verdict if you're selected on a jury?

MR. JACKSON: I can't really say.

R.238 at 76-77.

As the Seventh Circuit found, this questioning "injected a note of prejudice into the trial that plaintiffs had no way of overcoming, because the entire group of prospective jurors was exposed to it." App. 7. Moreover, the court found that the questioning stigmatized not only Mr. Jackson, but also plaintiffs and their entire case, since

it implied that "racial problems might arise if African-Americans were present." *Id.* Although the Seventh Circuit found no need to consider whether this error alone would have required reversal, when coupled with all the other errors that Petitioners do not challenge, its impact was severe. *See, e.g.*, R.237 at 571; R.239 at 228; R.239 at 197; R.237 at 567 (trial judge made erroneous statements of fact and law throughout the trial); R.237 at 615; R.270-1 at 454-56 (trial judge made inappropriate remarks that trivialized the issues).

The Seventh Circuit found additional error in the conduct of the Silvermans' counsel:

> We have nothing good to say about the tone of this trial, and we emphasize how important it is for judges, attorneys, and litigants alike to treat everyone in the court with respect, in an atmosphere free of racial, sex-related or other forms of bias. *Defense counsel behaved inexcusably* . . . Personal attacks on counsel and remarks that disparage others on the basis of sex or race have no place in the courtrooms of this Circuit.

App. 5 (emphasis added). The Seventh Circuit declined to consider whether this error alone called for reversal, but given the magnitude of counsel's misconduct, there is no doubt that if the case had not been reversed for other reasons, this impropriety would require a new trial. *See, e.g.*, R.270-1 at 505 (Silvermans' counsel grabbed exhibit out of the hands of plaintiffs' counsel); R.270-1 at 486-87 (Silvermans' counsel referred to one of plaintiffs' counsel as an "amateur" and "some kid"); R.271-1 at 270-1 at 505 (Silvermans' counsel referred to plaintiffs' counsel's actions as "amateur night" and "amateur conduct");

R.270-1 at 488-87 (Silvermans' counsel ordered plaintiffs' counsel to "sit down" and "stop interfering"); R.238 at 7-9; R.240 at 1219 (Silvermans' counsel used evidence in direct violation of an order *in limine*). (All this, the Seventh Circuit noted with disapproval, occurred in the jury's presence and was without any reprimand from the trial judge. App. 5.)

The Seventh Circuit also found that the jury instructions not only failed to give any deference to the HUD regulations, App. 15-16, but erroneously told the jury that the HUD regulations had no legal effect. (*Id.*)

Finally, plaintiffs identified other errors that the Seventh Circuit saw no need to address in light of the overwhelming number of other errors calling for a new trial. These included (1) the inconsistency in the jury's verdict finding Louis Silverman but not his co-defendants liable despite a stipulation that *all* of the defendants were responsible for all of the ads, (2) *Batson* violations, (3) the failure to instruct the jury of the organizational plaintiffs' right to damages for their legal efforts, and (4) a variety of evidentiary errors, *see, e.g.*, R.241 at 1137; R.237 at 639 (admission of hearsay evidence regarding racial composition of the building). Even if Petitioners' attacks on the Seventh Circuit's mitigation and *Daubert* rulings and its standard for harmless error had some merit, this multitude of additional errors would provide more than adequate basis for affirming the Seventh Circuit's decision to remand for a new trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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